

ERNEST DEAN CARPENTER,)	
)	
Petitioner,)	2:11-cv-00867-APG-CWH
)	
vs.)	ORDER
)	
D.W. NEVEN , <i>et al.</i> ,)	
)	
Respondents.)	
	/	

I. PROCEDURAL BACKGROUND

On March 16, 2007, Carpenter was convicted of burglary in the Second Judicial District Court for Nevada. The district court adjudicated Carpenter a habitual criminal and sentenced him to life in prison without the possibility of parole. *Id.* Carpenter appealed to the Nevada Supreme Court.

1 On February 13, 2008, the Nevada Supreme Court affirmed the judgment of conviction. On
2 September 30, 2008, Carpenter filed a proper person petition for a writ of habeas corpus in the state
3 district court. With the assistance of appointed counsel, he filed a supplemental petition on January
4 20, 2009. On May 11, 2009, the state district court dismissed all but one of Carpenter's claims.
5 After an evidentiary hearing on the remaining claim, habeas relief was denied by the district court.
6 Carpenter appealed.

7 In his opening brief before the Nevada Supreme Court he raised only one claim, arguing that
8 trial counsel was ineffective for failing to present certain mitigating evidence at sentencing. On
9 March 17, 2011, the Nevada Supreme Court affirmed the denial of Carpenter's state habeas petition.

10 On May 24, 2011, Carpenter initiated this federal habeas proceeding. Respondents moved to
11 dismiss the petition, arguing that certain claims in the petition were unexhausted. On January 11,
12 2011, this court granted the motion, in part, concluding that Grounds 1-B and 2 were exhausted but
13 Grounds 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(h) were unexhausted.

14 Carpenter was granted a stay and abeyance to allow him to return to state court. On May 1,
15 2013, he filed a second state habeas petition raising the claims this court found unexhausted. The
16 state district court dismissed the petition as procedurally defaulted. The Nevada Supreme Court
17 affirmed that decision.

18 On July 3, 2014, Carpenter moved to lift the stay. The stay was lifted on July 30, 2014.
19 Respondents then filed the motion to dismiss that is now before the court for decision.

20 II. PROCEDURAL DEFAULT

21 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the United States Supreme Court held that a
22 state prisoner who fails to comply with the state's procedural requirements in presenting his claims to
23 the state court is barred from obtaining a writ of habeas corpus in federal court if the procedural bar
24 imposed by the state court was independent of the federal question and adequate to support the
25 judgment. *Coleman*, 501 U.S. at 729. Where such a procedural default constitutes an adequate and
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1 independent state ground for the denial of habeas corpus relief, the default may be excused only “if a
2 constitutional violation has probably resulted in the conviction of one who is actually innocent,” or if
3 the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*,
4 477 U.S. 478, 496 (1986).

5 A state procedural bar is “adequate” if it is “clear, consistently applied, and well-established
6 at the time of the petitioner's purported default.” *Calderon v. United States District Court (Bean)*, 96
7 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994)); *see*
8 *also King v. Lamarque*, 464 F.3d 963, 966–67 (9th Cir. 2006). A state procedural bar is
9 “independent” if the state court “explicitly invokes the procedural rule as a separate basis for its
10 decision.” *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). A state court's decision is not
11 “independent” if the application of the state's default rule depends on the consideration of federal
12 law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000); *see also Coleman*, 501 U.S. at 735
13 (holding that there is no independent state ground for a state court's application of procedural bar
14 when the court's reasoning rests primarily on federal law or is interwoven with federal law).

15 Respondents argue that the following grounds in Carpenter’s petition are subject to
16 procedural default: Grounds 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(h). As noted, these claims were
17 presented in Carpenter’s second state post-conviction proceeding. In affirming the state district
18 court’s dismissal of that petition, the Nevada Supreme Court cited to the timeliness bar under Nev.
19 Rev. Stat. § 34.726(1) and the successive petition bar under Nev. Rev. Stat. §34.810(2). ECF No.
20 36-13. The state supreme court further determined that Carpenter could not show good cause and
21 actual prejudice for the purposes of excusing the procedural defaults. *Id.*

22 The Ninth Circuit has held that the Nevada Supreme Court's application of the timeliness rule
23 in NRS § 34.726(1) is an independent and adequate state law ground for procedural default. *Moran*
24 *v. McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir. 1996); *see Valerio v. Crawford*, 306 F.3d 742, 778 (9th
25 Cir. 2002). The Ninth Circuit also has held that, at least in non-capital cases, application of the
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1 abuse of the writ rule of NRS § 34.810(2) is an independent and adequate state ground for procedural
2 default. *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207,
3 1210–12 (9th Cir. 1999).

4 In this case, the Nevada Supreme Court's application of the procedural bars of NRS §
5 34.726(1) and NRS § 34.810(2) were independent and adequate grounds for the state court's
6 dismissal of petitioner's claims. Thus, Grounds 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(h) of the
7 petition are procedurally barred from federal review and must dismissed with prejudice unless
8 petitioner can show cause and prejudice to excuse the procedural bar, or that failure to consider the
9 defaulted claim will result in a fundamental miscarriage of justice.

10 To prove a “fundamental miscarriage of justice,” petitioner must show that the constitutional
11 error of which he complains “has probably resulted in the conviction of one who is actually
12 innocent.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*, 477 U.S. at
13 496). To demonstrate cause for a procedural default, the petitioner must “show that some objective
14 factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*,
15 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from
16 raising the claim. *McClesky v. Zant*, 499 U.S. 467, 497 (1991).

17 In his response to the motion to dismiss, Carpenter argues that he can establish cause under
18 *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), because ineffective assistance of counsel in his initial
19 post-conviction relief proceeding resulted in a failure to properly assert the ineffective assistance of
20 counsel claims set forth in Ground 3. As respondents point out, however, the claims at issue were
21 presented to the state *district* court in Carpenter’s first post-conviction proceeding. ECF No. 8-5 and
22 8-10. It was the omission of the claims from Carpenter’s subsequent appeal to the Nevada Supreme
23 Court that necessitated their presentation in the second, successive and untimely, state petition. ECF
24 No. 9-26. The holding in *Martinez* does not extend to the performance of post-conviction counsel on
25 appeal. *Martinez*, 132 S.Ct. at 1320 (“The holding in this case does not concern attorney errors in
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1 other kinds of proceedings, including appeals from initial-review collateral proceedings. . . .”).
2 Because Carpenter has not put forth any other cause for his procedural default or shown that a
3 constitutional violation has probably resulted in the conviction of one who is actually innocent,
4 Grounds 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(h) are procedurally defaulted for the purposes of
5 federal review.

6 III. INSUFFICIENT PLEADING

7 Respondents argue that Ground 3(h) does not meet the pleading standards applicable to
8 claims for habeas relief. In Ground 3(h), Carpenter claims that his constitutional right to effective
9 assistance of counsel was violated because counsel failed to consult with him with respect to
10 possible errors in his pre-sentence investigation (PSI) report. ECF No. 3 at 10-11. Respondents
11 argue that Carpenter’s failure to identify what errors he believes were contained in the PSI report
12 renders the claim conclusory and, therefore, subject to dismissal.

13 A petition for writ of habeas corpus under 28 U.S.C. § 2254 cannot rely upon mere “notice”
14 pleading, as may be found in other civil cases in the United States District Courts. *Blackledge v.*
15 *Allison*, 431 U.S. 63, 75 n. 7 (1977) (*citing* Advisory Committee Note to Rule 4, Rules Foll. Cases
16 under 28 U.S.C. § 2254). The petition must instead contain particularized facts which show that the
17 petitioner is entitled to relief upon each specified grounds. The facts alleged in the petition must be
18 sufficient in detail to allow the court to determine whether the petition should be summarily
19 dismissed, or should be given further review. *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir.
20 1990).

21 Carpenter suggests, in Ground 3(h), the alleged errors in the PSI report were related to his
22 criminal history, but does not further elaborate. This court is not required to comb through the state
23 court record to ascertain whether facts exist that might support relief. *See id.* at 333. Thus, this court
24 agrees that Ground 3(h) lacks sufficient detail to meet the habeas pleading standard. Accordingly, in
25 addition to being procedurally defaulted, the ground is subject to dismissal on that basis.
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IT IS FURTHER ORDERED that the respondents shall have **forty-five (45) days** from the date on which this order is entered to answer the remaining claims in the petition. To the extent they have not done so already, respondents shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner shall have **forty-five (45) days** from the date on which the answer is served to file a reply.


UNITED STATES DISTRICT JUDGE